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No. 10-871

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GENERAL ELECTRIC CO.,
Petitioner,

v.

LISA PEREZ JACKSON, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

1. The Government's brief in opposition ("Opp.") fails to acknowledge the extent to which the statutory scheme allowing the U.S. Environmental Protection Agency ("EPA") to impose Unilateral Administrative Orders ("UAOs") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") is an aberration in administrative law. This scheme produces irresistible financial pressure for Potentially Responsible Parties ("PRPs") to comply with UAOs, no matter how baseless, without affording the timely hearing before an impartial

decision-maker that is the traditional hallmark of due process. As the amicus brief of the Chamber of Commerce makes clear after detailed examination of numerous other regulatory regimes, "EPA's UAO scheme represents an extreme outlier." Chamber of Commerce Amicus Br. 22; *see also* Pet. 23-24 & n.11 (discussing additional statutory schemes). The decision below warrants review for holding that due process protections do not even apply to this extraordinary scheme of "sentence first, trial afterwards."

The fully developed factual record in this case—which the opposition conspicuously ignores—reveals the magnitude of the UAO scheme's coercive effect. EPA issues "approximately six UAOs to nineteen PRPs every *month*," Pet. App. 82a, and thus has ordered private firms to pay $5.5 billion over the last quarter century. For the more than 5,400 PRPs caught in the grasp of the UAO scheme, Pet. App. 82a, CERCLA creates an inescapable pincer. Because the PRP cannot obtain access to courts to protect its rights, 42 U.S.C. § 9613(h), the PRP must either comply with the UAO and hope to obtain reimbursement years later when a clean-up is finally complete, or refuse to comply, suffer an immediate and unavoidable loss of market value and increase in financing costs, and wait until EPA takes the PRP to court, Pet. App. 4a-5a. Given the chance to impose such coercive pressure, EPA prefers to issue UAOs as a matter of course rather than employ other provisions of CERCLA that would provide PRPs with meaningful predeprivation judicial review. Pet. 7-8 (citing EPA, OSWER Directive No. 9833.0-1A, Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions 3 (Mar. 7, 1990)). The record shows that the result is near-total compliance, as

only a handful of PRPs has ever risked actually challenging a UAO. Pet. App. 202a. As the Chamber of Commerce amicus brief correctly describes it, this is "regulation-by-sledgehammer." Chamber of Commerce Amicus Br. 13.

2. The extraordinarily coercive nature of the UAO scheme renders baseless the Government's concern that petitioner's arguments would throw into doubt such routine administrative actions as an FDA warning letter or an SEC investigation. Opp. 17. Such actions bear no resemblance to a UAO. The announcement of an SEC investigation, for example, is merely the opening move in a process in which any ultimate charge is immediately reviewable in federal court. Similarly, an FDA warning letter "is informal and advisory" and merely "communicates the agency's position on a matter, but it does not commit FDA to taking enforcement action." FDA, Regulatory Procedures Manual 4-1-1. In contrast, as the district court concluded, a UAO is a condensed prosecution and adjudication that finds facts and states legal conclusions while simultaneously making a PRP immediately legally responsible for a violation, requiring fulfillment of specific responsibilities and imposing specific penalties that commence on the UAO's effective date. Pet. 5 (quoting *Gen. Elec. v. Johnson*, No. Civ.A.00-2855, 2006 WL 2616187 at *15 n.5 (D.D.C. Sept. 12, 2006)).

Nor is the UAO statutory regime in any way comparable to the regimes governing either the SEC or the FDA. CERCLA prevents a PRP from challenging a UAO until it either pays EPA or EPA brings suit. Pet. App. 5a (discussing 42 U.S.C. § 9613(h)). Both the SEC and FDA schemes, in contrast, allow pre-deprivation recourse to federal courts. *See, e.g.*,

Sprecher v. Von Stein, 772 F.2d 16, 18 (2d Cir. 1985) (per curiam) (noting that an entity may contest "the validity of the SEC's investigatory motives or methods" by challenging an SEC subpoena under 15 U.S.C. § 78u(c)); *Genendo Pharm. N.V. v. Thompson*, 308 F. Supp. 2d 881, 885-86 (N.D. Ill. 2003) (noting that the recipient of an FDA warning letter may obtain a formal administrative ruling on the warning letter under 21 C.F.R. §§ 10.25, 10.30, and 10.85, and then obtain judicial review of the agency's response under 21 C.F.R. § 10.45(d)).

3. The Government likewise misapprehends (Opp. 17-23) the conflict the petition asserts with this Court's decision in *Connecticut v. Doehr*, 501 U.S. 1 (1991). *Doehr* held that consequential effects such as "cloud[ing] title" and "taint[ing] any credit rating" are themselves deprivations of property under the Due Process Clauses. *Id.* at 11. The D.C. Circuit held that "nothing in [*Doehr*] implies that consequential injuries, standing alone, merit due process protection." Pet. App. 16a. But the D.C. Circuit's reinterpretation of *Doehr* stands in stark contrast to this Court's holding that "even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection." *Doehr*, 501 U.S. at 12; *see also id.* at 19 (plur. op.) (noting that "the impairments to property rights that attachments effect merit due process protection"), 22 (describing additional consequential harms that result in property deprivations).

The petition does not rely on *Doehr* for the proposition that "consequential harms *themselves* can constitute protected property interests," Opp. 17 (emphasis in original), but rather that the consequential

harms can deprive the owner of its pre-existing property rights that are plainly protected by state law. This is clear from the way in which the operative language of *Doehr* tracks the decision of the lower court in that case. *Compare Doehr*, 501 U.S. at 11 (An attachment "clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; [and] reduces the chances of obtaining a home equity loan."), *with Pinsky v. Duncan*, 898 F.2d 852, 854 (2d Cir. 1990) ("An attachment not only impairs the marketability of the real estate, but also may harm the owner's credit rating, and may prevent him from using the property as collateral for a loan."), *aff'd sub nom Doehr v. Connecticut*, 501 U.S. 1. In considering these consequential harms, *Pinsky* asked whether there was a "[d]eprivation of a [p]rotected [p]roperty [i]nterest?" And the Second Circuit answered in the affirmative, holding "that a nonpossessory attachment of real estate deprives the owner of a constitutionally protected property interest under the fourteenth amendment." 898 F.2d at 854. By explicitly agreeing with the Second Circuit's decision in *Pinsky*, *see Doehr*, 501 U.S. at 11, this Court left no doubt that it was likewise holding that consequential harms can deprive an owner of its property interests.

The Government is similarly hard-pressed to contest the conflict with *Pinsky*, *Doehr*, and the First Circuit's decision in *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991) (en banc), that arises from the D.C. Circuit's holding that *Doehr*'s operative language "comes not from the Court's analysis of whether attachment requires due process protection, but instead from the portion of its opinion weighing the significance of the private interests at stake," Pet. App. 15a. The First Circuit held squarely that, "in

light of [the same language], we cannot but conclude that the lien on real property . . . amounts to a *deprivation* of a 'significant property interest' within the meaning of the due process clause," *Reardon*, 947 F.2d at 1518 (emphasis added). For the same reason, the D.C. Circuit's holding also conflicts with the Rhode Island Supreme Court's decision in *Gem Plumbing & Heating Co. v. Rossi*, 867 A.2d 796, 807 (R.I. 2005), which also interprets *Doehr* as holding "that the effects of the attachment, primarily the clouding of title, deprive[] the property owner of a 'significant' property interest."

Seeking to minimize these conflicts, the opposition would distinguish this case based on the narrow fact that *Doehr* and *Reardon* dealt with liens or attachments, rather than a UAO. Opp. 20-21. The D.C. Circuit made no such distinction, *see* Pet. App. 15a-16a, and in any event, such a distinction fails. The opposition argues that *Doehr* and *Reardon* are inapplicable because they dealt with government instruments that were "attached to property or some other right and that may lessen its value." Opp. 20 (emphasis omitted). But a UAO does exactly the same thing: it attaches to a PRP's property and lessens its value—for example, the amount it would command in a sale. *See Black's Law Dictionary* (9th ed. 2009) (defining "value" as "the amount of goods, services, or money that something commands in an exchange"). The fact that UAOs devalue a PRP's property interest in the market value of a business enterprise rather than the market value of a bank account or a piece of real property does not alter the due process equation.

Thus, contrary to the opposition's suggestion, a UAO creates the same effects as the liens or attachments in *Doehr* and *Reardon*. As amicus Chamber of

Commerce observes, a UAO "impairs the company's right to dispose of property by limiting alienability," "deters potential buyers and mortgage lenders," and "reduces the company's stock value and credit rating." Chamber of Commerce Amicus Br. 10. The primary difference between the UAO here and the attachment at issue in *Doehr* is the label applied. But this Court has "consistently eschewed" the "[d]etermin[ation of] constitutional claims on the basis of such formal distinctions, which can be manipulated largely at the will of the government agencies concerned." *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 679 (1996).

The opposition fails as well in its attempt to reconcile this case with recent decisions from the Second and Third Circuits. The Second Circuit held that a state rule that delayed access to a property right was a deprivation of that right under, *inter alia*, *Doehr*, because the "property interest in the underlying asset suffers, as the [asset] depreciates over time." *Ford Motor Credit Co. v. N.Y.C. Police Dep't*, 503 F.3d 186, 192 (2d Cir. 2007). Similarly, relying on *Doehr*, the Third Circuit held that an assessment on an inmate's account was a deprivation of property because, "[a]s with [an] estate subject to an encumbrance, the economic value of [the inmate's] institutional account was reduced at the time of the Department of Corrections' assessment and remained impaired for upwards of three years." *Burns v. Pa. Dep't of Corr.*, 544 F.3d 279, 281 n.2, 290 (3d Cir. 2008). Despite the opposition's reliance on form over substance, a lien, assessment, or UAO all deprive an owner of a property interest. Nor did the D.C. Circuit state otherwise, holding only that, regardless of form, consequential injuries do not merit due process protection. Pet. App. 16a.

The Government is likewise incorrect that a PRP has no "legitimate claim of entitlement" to its interest in its market value and credit rating. Opp. 16. While these harms are caused by market reactions, *Doehr* and three federal circuit courts squarely reject the opposition's contention that "consequential" harms cannot deprive a firm of its property.[1] Any argument that a PRP does not have a property interest in its credit rating or stock price is incorrect. While a stock price may fluctuate, the stock itself is "[t]he capital or principal fund raised by a corporation through subscribers' contributions or the sale of shares." *Black's Law Dictionary* (9th ed. 2009). By causing a $76.4 million drop in a company's stock price, Pet. App. 64a, a UAO literally deprives a company of $76.4 million worth of funding for operations. Likewise, as amici Finance Professors and Scholars make clear, a firm's credit rating directly affects its access to the "lifeblood" of credit, such that "[e]ven a modest decrease in a firm's credit rating can dramatically increase the interest rate that the firm must pay to

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[1] The additional cases cited in footnote 8 of the opposition, Opp. 20 n.8, are not to the contrary, as they either involve the "stigma-plus" test that is not at issue here, *see URI Student Senate v. Town of Narragansett*, 631 F.3d 1, 11 (1st Cir. 2011) ("When a specified harm is predicated on voluntary third-party behavior, it cannot serve as a 'plus' factor."), or involve generalized administrative decisions not directed at a particular party, *see Nuclear Transp. & Storage, Inc. v. United States*, 890 F.2d 1348, 1354 (6th Cir. 1989) (holding that a change in the government's policy so as to allow for temporary, free storage of certain nuclear materials does not deprive a firm that holds a license to sell storage of the same material of its property); *Indus. Safety Equip. Ass'n v. EPA*, 837 F.2d 1115, 1112 (D.C. Cir. 1988) (holding that an agency's issuance of a report that disapproves of certain types of respirators does not deprive manufacturers of those respirators of their property).

obtain credit . . . [with] attendant consequences for a company, its stockholders, and its employees." Finance Professors and Scholars Amicus Br. 2-3. A UAO's detrimental effect on a PRP's stock price or credit rating is the functional equivalent of the federal government prohibiting certain firms from borrowing money or selling stock in specified amounts.

4. The Government's response to petitioner's *Ex Parte Young* claim is similarly unavailing. The factual record in this case, largely undisputed by the opposition, reveals a coercive impact so overwhelming that it "preclude[s] a resort to the courts" for the purpose of challenging government action. *Ex Parte Young*, 209 U.S. 123, 145-46 (1908). As established in the district court, of the 5,400 PRPs that have received a UAO over the last quarter century, Pet. App. 82a, only a minute portion ever elected to challenge a UAO, Pet. App. 202a. It is easy to see why: with costs of compliance averaging $4 million, Pet. App. 77a, and immediate market impacts from non-compliance averaging $76.4 million plus a significant increase in financing costs, Pet. App. 64a, 76a, combined with the threat of immense fines stretching to over $82 million *per violation*, Pet. App. 182a-83a, 197a, the "choice" is no choice at all. Due process principles "normally do not require [parties] to bet the farm by taking violative action before testing the validity of a law." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 (2010) (ellipsis and internal quotation marks omitted) (citing, *inter alia*, *Ex Parte Young*, 209 U.S. 123). If the facts of this case do not establish a

forbidden Hobson's choice, then *Ex Parte Young* is a dead letter.[2]

The opposition also misapprehends petitioner's argument based on *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). Petitioner is not arguing that this case is "inconsisten[t]" with *Thunder Basin*, Opp. 13 n.5, but rather that this case is distinct from *Thunder Basin*, Pet. 22-23, in ways that point to a due process violation here. *Thunder Basin* held a statutory scheme consistent with *Ex Parte Young* because, although the penalties on the mine operators were "onerous," the mine operator could request expedited administrative proceedings and obtain temporary relief from a court of appeals. *Thunder Basin*, 510 U.S. at 218 (citing 30 U.S.C. §§ 815(d), 816(a)(2)). In contrast, because of the jurisdiction-stripping provision of 42 U.S.C. § 9613(h), a PRP must wait for EPA to "take its own sweet time before suing." *Reardon*, 947 F.2d at 1519. In the meantime, the PRP must wait, sometimes up to six years, *see* 42 U.S.C. § 9613(g)(2), for EPA to make its decision, with each day imposing an additional $37,500 per violation in contingent liability. The speculative possibility that a reviewing court might, after years of additional litigation, exercise restraint in assessing daily penalties, Opp. 14 n.6, is no solace to the PRP *ex ante* in deciding whether to comply. This case thus

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[2] Contrary to the Government's suggestion, petitioners are pursuing here, in addition to a facial challenge, the pattern and practice claim that created through discovery a clear record of the coercive effect of the UAO regime. The D.C. Circuit correctly upheld jurisdiction over this claim, Pet. App. 24a, 126a-127a, and a single sentence in a footnote, Opp. 10 n.4, is insufficient to contest this part of the Court of Appeals' decision.

presents a substantially more severe *Ex Parte Young* problem than *Thunder Basin*.

5. Finally, the opposition points to three alleged protections available to a PRP facing a UAO. Opp. 11-12. Each of these "protections" only serves to reinforce the unconstitutional nature of the UAO regime. *First*, the opposition claims that EPA may provide notice to a PRP that it will receive a UAO. Opp. 11. This notice is of little use: when one is tied to the tracks in the face of an oncoming train, it does not help if the train blows its whistle. Likewise, making a PRP aware that it is now tied to the tracks is of small comfort.

Second, the opposition argues that a PRP does not have to pay any money until EPA brings an enforcement suit. Opp. 11. This claim ignores the threat of massive fines and the immediate consequential harms addressed above. In any event, the blithe assurance that "the Sword of Damocles may not fall" provides no safety to those who sit beneath it.

Third, the opposition argues that a PRP can always pay the compliance costs and then later obtain reimbursement. Opp. 12. But this "solution" is itself a due process violation. Given that the Government has conceded that UAOs are not used in environmental emergencies and does not contest that the money spent on compliance costs is a protected property interest, Pet. App. 10a, 80a, the opposition's argument boils down to the claim that "a wrong may be done if it can be undone," *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972), an assertion this Court has long since rejected, *id.* Forcing a PRP to pay now, without judicial review, for a chance to recover later does little to "trim the horns" of any dilemma, Opp. 12; it merely exchanges one set of horns for another.

CONCLUSION

The petition for a writ of certiorari should be granted.

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